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# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1698

DOROTEA ZALDIVAR V. DE TENORIO, ET AL.,
*Petitioner,*

vs.

CHARLES LAVELL LIGHTSEY, ET AL.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## REPLY BRIEF

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## REPLY BRIEF

Respondent argues two points on which we comment in this reply.

Emphasis by Respondent on the Fifth Circuit's view that due process of law extends only to questions of a direct taking of property by the signators to the Treaty, in this case the federal government, suggests some variation on the statement of questions for review. The question is:

> Is the Treaty provision found in Article I that: "Their property shall not be taken without due process of law and without payment of just compensation" limited to a taking by the federal government, as by expropriation or eminent domain, or does it extend to a taking under color of a state statute which, as construed below, adversely discriminates against Treaty Nationals solely on the basis of national origin?

The Court of Appeals answers in the affirmative. It denies to Hondurans an extension of time within which to hold inherited property equal to the time allowed to nationals of other countries, - thereby condoning the denial of the equal protection of the law implied in the mandate for due process of law.

We respectfully submit that this narrow and restrictive construction strikes at the very heart of the Treaty and deserves review by this Court, because leadership in a manifestation of good faith on the part of this nation in upholding to the fullest extent the spirit as well as the letter of Treaties of Friendship and Commerce with friendly nations around the world is of the utmost importance.

A brief discussion follows.

On page 9, Respondent asserts that the Fifth Circuit based its opinion as much on one article of the Treaty as another and proceeds to quote Judge Coleman's view of Article I as follows:

> "[2] The language in the last sentence of the fourth paragraph of Article I, reads, 'Their property shall not be taken without due process of law and without payment of just compensation.' This obviously refers to one of the contracting powers taking property from the citizen of the other. This is so because private parties, personal or corporate, have never had the right to take property from another. Consequently, this limitation must be construed as referring to takings by the respective signators to the Treaty from citizens of the other. The litigation now before us does not involve expropriation, eminent domain, or any similar taking of property by governmental action. (Tenorio v. McGowan, 510 F.2d 92 [CA 5, 1975]" (A.35).



The quoted conclusion indicates that the panel majority was aware of Article I but it also proves beyond doubt that the Court declined to give it any effect whatever. Indeed, the failure of the Fifth Circuit to give effect to the due process of law mandate is what the petition to this Court is all about.

True, the United States government, as the contracting power on this side of the Treaty, did not take the property of the Honduran National, and her property was not taken through expropriation or eminent domain by the government, but her property was taken from her by force of a state statute, as construed and applied by the Court of Appeals, and transferred to or vested in another.

To limit the reach of due process of law to an act of the "respective signators to the Treaty", - that is to say by the act of the federal government, - is to read a restrictive clause into the Treaty which is not there.

The Treaty reads in pertinent part (A.74):

> "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation."

The "constant protection and security for their persons and property" extends expressly throughout the "territories" of each nation. Mississippi is a part of the territory of the United States. Persons and property are put upon

an equal footing in the terms of the protection afforded by the Treaty. The Treaty carries no words of restriction.

Due process of law prohibits the impermissible taking of one person's property and vesting it in another under color or force of discriminatory law, - whether that law be one of national or state creation.

In this case, due process of law includes, at the minimum, treatment by the state government of Honduran Nationals on a plane of protection equal to its treatment of other non-resident aliens who are allowed to inherit and hold land indefinitely in the territory of Mississippi, as in the case of the Nationals of Syria and the Lebanese Republic. The discrimination is facial, and no basis for a lawful classification has been suggested and none is apparent.

Respondent argues that the Treaty must be read as a whole and that Article IV limits Article I by the phrase:

> ". . . such national shall be allowed a term of three years in which to sell the same (real property), this term to be reasonably prolonged if circumstances render it necessary. . ." (A.75).

However, the argument does not read the Treaty as a whole but, like the reasoning of the Fifth Circuit, simply ignores the application of Article I.

The two articles of the Treaty are easily reconciled. The circumstances which render necessary the prolongation of the term for holding inherited property is the implied due process of law mandate for equal treatment under law.

Since Mississippi allows by law an indefinite time for certain non-resident aliens to hold land following inheri-



tance, the due process of law guaranteed by the Treaty requires equal treatment in the protection of the property rights of the treaty nationals.

It is only by adding to Mississippi's list of favored non-resident aliens the Nationals of Honduras that invidious discrimination can be avoided and the command of due process satisfied.

The granting of due process relief in this case does not require the voiding of the Mississippi statute or the elimination of the state's favored nations from its provisions, and no such result is suggested by Petitioner. It is only necessary that the Court adjudge that the Nationals of Honduras are entitled to equal time for holding land acquired by inheritance from citizens of Mississippi, U. S. A.

We urge the Court to review the important and far-reaching questions of Treaty construction in terms of the constitutional equivalence of due process of law as that concept precludes invidious discrimination against those entitled, by the terms of the Treaty in question, to the equal protection of the law.

Equally as serious as the effect of invidious discrimination on the individual Treaty National is the effect of the same discrimination upon this nation's foreign relations.

Unquestionably, the state, by its act of choosing among nations, has intruded itself into the realm of foreign affairs reserved to the federal government. Is that intrusion permissible?

Respondent argues that the intrusion is not really serious and is incidental and indirect, but no authority is cited which supports this argument in the circumstances of the present case.

Our government is built upon an abiding respect for persons and property. Our Constitution is designed to protect personal rights and property rights. So it is with the Honduran Treaty, which stands equal with other laws as the supreme law of the land, when it speaks in constitutional terms of the protection by the due process of the law of property rights.

Therefore, it is difficult to imagine a more primary and direct effect upon Treaty nations than that of the taking of the property of its Nationals while, at the same time, protecting fully the right of others of different nationalities to hold property indefinitely.

The Treaty paves a two-way street. Adverse treatment of Hondurans in this country can have its effect upon the property rights of Americans in the Republic of Honduras, who must also depend upon the Treaty assurance that: "Their property shall not be taken without due process of law and without payment of just compensation".

## CONCLUSION

Thus far, the one judicial precedent dealing with Treaty due process of law has ignored or disregarded the mandate for avoidance of invidious discrimination. This Court is presented with its first opportunity to speak on the subject, and we respectfully submit that a ruling will serve the nation's interest in important areas of concern in the realm of foreign relations and human rights.

On the merits, we will ask that this Court adjudge that Honduran Nationals are entitled to hold inherited land on a basis equal to the rights afforded by Mississippi statute to the nationals of its most favored nations and that the



decision of the Court of Appeals be reversed with directions to reinstate the initial judgment of the United States District Court.

Respectfully submitted,

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